70-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

[redacted]

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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No. 961

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondent*

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the employer was required by Section 8 (a)(5) of the Act to renegotiate with the union representing active employees the medical benefits of persons already on retirement, or whether the employer could lawfully offer past retirees an individual option of continuing their established medical benefits or electing, instead, to receive a cash contribution to cover the cost of Medicare.

STATEMENT OF CASE

The facts are simple.

The union was certified in 1948 as the exclusive representative of the company's employees at its Barberton, Ohio, plant. The unit was restricted to all employees "working on hourly rates," and only those appearing on the active payroll were allowed to vote. Retirees were not included in the unit and did not vote in the election (App. A, pp. 15-16).[1]

From time to time since 1950, the company and union have negotiated retirement benefits for the active employees to take effect upon their retirement. The company maintained throughout, however, that it was not required to renegotiate changes in retiree benefits after retirement.

The company was willing to consider voluntary improvements in retiree benefits after retirement and, in fact, did so on several occasions.

In 1950, the company voluntarily agreed to allow persons on retirement to participate in the medical program. In 1954, the company again voluntarily improved the medical benefits for retired employees. Then, in 1962, the company voluntarily agreed to contribute $2.00 per month toward the cost of medical insurance, but only for employees who retired after June, 1962.

Later, in 1964, the company again voluntarily agreed to increase the $2.00 per month contribution to $4.00 per month, with the express understanding

[1] Record references are to Petitioner's Appendix to the Petition in Case No. 910.

that if Medicare were adopted, the contribution would revert to $2.00 per month.

That set the stage for the 1966 events at issue in this case.

Medicare was enacted in 1965 to take effect July 1, 1966. In March 1966, the company informed the union that, after extensive study of its medical plan for retirees, it had decided to discontinue the medical insurance plan for retirees because the plan contained non-duplicating features which rendered it valueless in view of Medicare. To assure the continuance of medical benefits, the company proposed to contribute $3.00 per month for each eligible retiree to cover the cost of Medicare. When the union objected to cancellation of the medical insurance, the company reconsidered, and decided to leave the medical insurance plan intact. In addition, the company offered each retiree the option of continuing under the medical plan or withdrawing and receiving a $3.00 per month contribution to Medicare (App. A, pp. 2-5).

The union filed charges with the NLRB.

The Trial Examiner's Decision

The gravamen of the charge was that the company had unilaterally modified its collective bargaining agreement by allegedly changing its medical plan for retirees.

The Trial Examiner found that, since the medical plan was kept intact, the company had merely afforded the retirees an additional option to exercise as they saw fit. This, he found, did not amount to a change or modification of the terms of the labor agreement. The Examiner further found that, for purposes

of Sections 8(a)(5) and 9(a), retirees are not "employees" of the company and not a part of the bargaining unit. Thus, he concluded that, while bargaining on their behalf was permissive, it was not mandatory under the Act. (App. E, pp. 56-73).

The Board Decision

The Board majority reversed the Examiner. The Board did not restrict itself to the narrow issue presented—whether the company had unilaterally modified an agreement—but chose to use the case as a vehicle for considering the broader issue of the status of retirees in relation to mandatory bargaining under the Act.

The Board majority carefully skirted the question of whether retirees are "employees" of the employer within the explicit meaning of Section 8(a)(5) or members of the bargaining unit under Section 9(a). Indeed, the Board conceded that, upon retirement, "most of the threads which once bound him [the retiree] to the unit are severed . . ." (App. D, p. 33).

Nevertheless, placing primary emphasis on what it regarded as social need, the Board majority held that retirees are "employees" in the general sense and, therefore, encompassed by the mandatory bargaining obligation under Section 8(a)(5). In the alternative, the Board majority held that, even if not employees or in the bargaining unit, renegotiation of retiree benefits after retirement is mandatory because their benefits "vitally affect active bargaining unit employees." (App. D, pp. 21-49) Implicit in the Board's holding would be the right of the bargaining agent to renegotiate retiree benefits *up or down.*

One Board member dissented.[2] He found that retirees were not employees of the employer under Section 8(a)(5) or members of the bargaining unit under Section 9(a). He pointed to a long line of Board decisions excluding retirees from bargaining units and from voting in employee representation elections. He found that, while some employers had voluntarily renegotiated changes in benefits for retirees after retirement, such voluntary practices did not create a mandatory obligation under the Act (App. D, pp. 49-54).

The dissenting member questioned the Board majority's broad policy pronouncements. He stated:

> "Stripped to its essentials, this is a case where a union charged an employer unilaterally offered an additional option on its health plan for pensioners. The company said it did so because the Federal Medicare program made its own program obsolete, but, after union protests, assured the pensioners they could choose to retain the original program without change. On this narrow base, the Board majority has erected a decision of far-reaching implications in the mandatory duty to bargain." (App. D., pp. 49-50).

Decision of the Court Below

On a petition for review, the court below set aside the Board's order. A petition for rehearing before the court, *en banc,* was denied.

The court below held that there is no issue as to whether retirement benefits for active employees to vest upon retirement are mandatory bargaining subjects. This was settled long ago in *Inland Steel Com-*

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[2] The current NLRB Chairman has since noted his disagreement with the Board majority. See *Hooker Chemical Corporation,* 186 NLRB No. 49, Note 2 (1970).

pany v. *NLRB,* 170 F.2d 247, (C.A. 7, 1948), cert. den. 336 U.S. 960. The court also held there is no issue as to the legal enforcement of retirement benefits. These benefits are protected by Federal law (App. A, p. 17).

The court below found that the only issue presented was whether "an employer may propose improvements in benefits to the retirees individually" or whether the union representing current employees may force the employer to renegotiate retiree benefits after their retirement (App. A, pp. 7-8, 9-10).

On this issue, the court held that the mandatory bargaining obligation under Section 8(a)(5) applied only to "employees" of the employer and only those employees who are members of the unit established as appropriate for bargaining under Section 9(a). The court below found inapplicable those cases cited by the Board which hold that antidiscrimination provisions of the Act [Section 8(a)(1) and (3)] extend protection to applicants for employment and to laid-off and discharged employees. The court correctly noted that, while it is true that for many purposes the Act extends protection to employees not currently serving employers, "by plain meaning an employer has no statutory duty to bargain collectively with respect to persons who are not 'his employees'." The court noted that this distinction was recognized by this Court as long ago as 1941 in the landmark decision in *Phelps Dodge Corporation* v. *NLRB,* 313 U.S. 177 (1941).[3] The distinction also has been uni-

[3] In *Phelps Dodge,* the Court stated:

"In determining whether an employer refused to bargain collectively with representatives of 'his employees' in violation of § 8(5) and § 9(a), it is of course essential to determine who constitutes 'his employees'. One aspect of this is covered by § 9(b) which provides for the determination of the appropriate bargaining unit. 313 U.S., at 192."

formly recognized by the Board prior to this case. See, for example, *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, 163, 43 LRRM 1383 (1959).[4]

In addition, the court held, the mandatory bargaining obligation is further limited to the unit appropriate for bargaining as defined under Section 9(a). Section 8 (a)(5) expressly so provides. The court noted that it is well-settled law that the scope of the bargaining unit controls the extent of the mandatory bargaining obligation. See for example, *Douds* v. *I.L.A.*, 241 F.2d 278 (C.A. 2, 1957).

Examining the facts in the light of these recognized principles, the court below found that persons on retirement are not employees of the employer and not in the bargaining unit.

The court found that retirement with this employer is a permanent severance of employment. Retirees have no expectancy of reemployment, perform no services for the employer, receive no wages, and are under no restrictions as to other employment or activities. By the same token, this record shows that retirees have no active, voting status in the union and are thus unable to exert a voice in determining the union's policies. In short, retirees meet none of the normal indicia of employment. The fact that retirees receive

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[4] In *Page Aircraft*, the Board said:

> "We do not regard as controlling for the purpose of determining for whom an employer must bargain those cases cited . . . which hold that the antidiscrimination provisions of Section 8(a)(3), (4) and (b)(2) of the Act forbid discrimination against applicants for employment. The antidiscrimination provisions refer to 'employee' *generally*, whereas, unlike these provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for '*his* employees'." [Emphasis in original], 123 NLRB at 163.

retirement benefits and are given the status of "honorary" members of the union merely serves to emphasize the finality of their employment severance.

Turning to the bargaining unit, the court held that the unit for bargaining certified by the Board included active employees only and clearly excluded retirees.

The exclusion of retirees from the bargaining unit and from voting on the election of the unit representative was in line with unbroken Board precedent. As the court pointed out, in no prior case where the issue was raised has the Board held that a permanent retiree is a part of the unit or entitled to vote in an election. See *Taunton Supply Corporation,* 137 NLRB 221, 223 (1962); *Public Service Corporation of New Jersey,* 72 NLRB 224, 229-230 (1947);[5] *J. S. Young Company,* 55 NLRB 1174 (1944); *W. D. Byron & Sons,* 55 NLRB 172, 174-175, 14 LRRM 25 (1944).

The court concluded that, since retirees are not employees of the employer and not in the bargaining unit, the employer had no mandatory duty to renegotiate their retirement benefits with the unit representative.

The court then considered the Board's alternative holding, which was that even if not employees of the employer or in the bargaining unit, mandatory re-

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[5] In *Public Service Corporation,* the Board said:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers and have little expectancy of resuming their former employment. In any event, even if pensioners were to be considered as employees, we believe that they lack a substantial community of interest with the employees who are presently in the active service of the Employers."

negotiation of retiree benefits after their retirement is required because the subject "vitally affects" unit employees.

To support this contention, the Board argued (1) that the union and the current employees have a legitimate interest in assuring that retirement benefits are in fact paid; (2) that active employees have a "selfish interest" in bargaining about retirement benefits; and (3) that employer funds spent to pay benefits to retirees "affect the availability of funds" to pay benefits to active employees.

The court below found none of these arguments persuasive on the issue of mandatory bargaining for retirees.

First, the court pointed out that, once retirement benefits have been established, earned and become payable, the employer may not recant the obligation and, if he attempts to do so, the law provides a remedy. Section 301, Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a).

Second, the court held that it is not necessary to extend the bargaining obligation to persons already retired in order to insure current employees the right to negotiate their own retirement benefits to take effect after retirement. Their superior bargaining power and ability to strike insures them the effective exercise of this right without involving retiree benefits in the bargaining. The appropriate time for an employee to negotiate his retirement benefits is when he is still employed.

Third, the court found no substance in the Board's argument that the union must control the benefits of retirees because retiree benefits siphon off employer

funds which would otherwise be available for increased wages and benefits for active unit employees.

The court found a conclusive answer to this argument in the Act's requirement that "the bargaining agent's authority extends only to bargaining for 'all of the employees in a unit appropriate for such purposes'." See Section 9(a). Since retirees are not employees of the employer and not in the bargaining unit, the union is not their exclusive representative and there is no obligation to bargain their benefits with the union. Moreover, the court correctly perceived that the Board's argument proves too much. As the court pointed out, all employer expenditures, from dividends to capital expenditures, salaries, and wages of supervisors and employees outside the bargaining unit, and a host of other expenditures necessarily affect the "availability" of employer funds for active employees. Surely, the court said, the Board would not contend that these expenditures are subject to mandatory bargaining.

The court concluded that the Board's alternative holding is not only without support in the language of the Act but is also in defiance of its purpose.

ARGUMENT

The case does not present an issue appropriate for review by the Court.

The decision below is well-reasoned and is clearly correct. There is no conflict of Circuits or with decisions of the Court. On the facts, the case presents a narrow issue not justifying the Board majority's far-ranging dictum.

The importance, and even the novelty, of the issue is overdrawn. While in a sense the issue is one of

first impression, the legal principles applied by the court below are well settled and have long been recognized as controlling the scope and extent of the bargaining process under the Act.

As the dissenting Board member and the court below noted, employers and unions have over the years developed a variety of voluntary practices and accommodations for treating with retiree benefits. The success of these voluntary endeavors is shown by the almost total lack of controversy over this issue. Out of the huge volume of cases arising before the Board on a multitude of contested issues, this is the first case in its 35-year history that the Board has felt called upon to address itself to this issue. This speaks well of the capacity of labor and management to deal realistically and practically with a problem on a purely voluntary basis. It also speaks well of the flexibility and adaptability of free collective bargaining and its ability to function in a difficult area without creating undue stress or strain. As the court below wisely said, these voluntary efforts should be encouraged, not strait-jacketed into a rigid mandatory requirement.

A. The Decision of the Court Below Is Clearly Correct

The carefully considered opinion of the court below contains in full measure its own rationale and support. The issue is not a close one, and the unanimous decision was clearly correct.

The court's reading of the Statute in terms of both language and purpose cannot be questioned. The entire statutory scheme is constructed on the basic principle that mandatory bargaining is confined to bargaining units composed of employees of the em-

ployer sharing a close community of interests in wages, hours, and working conditions.

To this end, Section 9 of the Act provides mechanisms and procedures for defining the unit for bargaining and for the selection of a unit representative by majority voice of the unit members. Once the representative is selected in the unit as defined, that representative is accorded the status of the sole and exclusive representative of *all* the members of the unit. This is a very special status, and one which carries with it great powers. But this power is confined to the employees in the unit which was found appropriate and whose members selected the unit representative.

This exclusive representation status is coextensive with the bargaining unit, but it extends to no other class of employee or persons who are excluded from the unit as defined.[6]

Section 8(a)(5) imposes on the employer the mandatory duty to recognize the unit representative and bargain on behalf of "his employees" in the bargaining unit. Section 8(b)(3) imposes the same obligation on the unit representative. The bargaining obligation encompasses all members of the unit but no one else. That is the statutory scheme, and, until this case, the Board and courts have honored and enforced this principle without exception. The principle is axiomatic by now. The scope of the bargaining unit controls the legality and scope of the bargaining obli-

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[6] The Board acknowledged this in its Brief in the court below:

> "We do not take issue with the proposition suggested by the various cases cited by the Company (Br. 26) that an employer is under no duty to bargain for employees not within the bargaining unit." (Bd. Br. 30)

gation. *Douds* v. *I.L.A.*, 241 F.2d 278 (C.A. 2, 1957); *I.L.A.* v. *NLRB*, 277 F.2d 681 (D.C. Cir. 1960); *AFL-CIO Joint Negotiating Committee*, 184 NLRB No. 106, 74 LLRM 1705 (1970).

If this unit bargaining principle were abandoned, chaos would be injected in bargaining relationships. A bargaining representative, once certified for a particular unit, could then demand bargaining for excluded classes of employees in the same plant or even other plants or establishments operated by the same or even another employer. A certification would then lose its dignity as defining the allowable scope of mandatory bargaining and become a mere launching pad for demanding bargaining of wages and benefits for persons far removed from the unit which the union was certified to represent.

Such a radical departure from well-settled principles could only serve to proliferate and exacerbate labor-management conflict and encourage jurisdictional disputes.

The Board's projected departure from the statutory principle of unit bargaining would also make serious inroads in the principle of majority rule embodied in Section 9. Under Section 9, the members of the bargaining unit have the right to select, reject, change, or decertify their bargaining representative. They also generally have the right through election of officers and bargaining committee and ratification of agreements to control the policies of their selected bargaining agent.

The Board's new theory of "interest" bargaining, as opposed to "unit" bargaining, necessarily contemplates exclusive representation of categories of employees or persons, such as retirees, who are not in

the unit and have no voice in the selection or rejection of the unit representative or in its bargaining policies. In this very case, in accord with uniform Board policy, retirees were not included in the bargaining unit and did not vote in the NLRB election of the unit representative.[7] Moreover, retirees hold "honorary" membership only in the union and have no vote or voice in union affairs. As recent as November 11, 1970, the Board has conducted another representation election in the same unit at the Barberton plant, and has again excluded retirees. Case No. 8-RC-7934.

This conflict with basic principles of industrial democracy further points up the incompatibility with statutory principle implicit in the Board's "interest" bargaining concept.

B. There Is No Conflict of Decision

Petitioner claims a conflict with decisions of this Court in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), and *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959).[8]

There is no conflict with these decisions.

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[7] As the Board has long held in determining the appropriateness of bargaining units:

> "First and foremost is the principle that mutuality of interest in wages, hours, and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit." *Continental Baking Co.*, 99 NLRB 777, 782 (1952).

[8] The Board petitioner has apparently abandoned the claim, elaborated by the Board in its decision (App. D, 36), that appellate court opinions construing Section 302(b) of the Act should govern the construction given to Section 8(a)(5) of the Act. *Blassie* v. *Kroger Co.*, 345 F.2d 58 (C.A. 8, 1965); *Teamsters Local No. 688* v. *Townsend*, 345 F.2d 77 (C.A. 8, 1965); *Garvison* v. *Jensen*, 355 F.2d 487 (C.A. 9, 1966).

The Board continues to confuse the subject matter for bargaining with the identity and composition of the unit for bargaining.

In *Fibreboard,* the Court was careful to confine its holding within narrow limits. The decision holds that an employer violates his bargaining obligation when he contracts out all of the work in the bargaining unit without prior notice and bargaining with the unit representative. Enforcement of the bargaining obligation was necessary in *Fibreboard* to protect unit work from total obliteration by contracting out.

In *Oliver,* involving application of a state antitrust law, the employer was contracting out unit work to owner-drivers performing the same work as employee drivers. The Court upheld a contract provision regulating the minimum equipment rental to be paid the owner-driver as a reasonable restriction to protect the jobs and rate structure of the regular employees.

In both *Fibreboard* and *Oliver,* the bargaining sanctioned by the Court was considered necessary to protect unit work from erosion by contracting out. In *Fibreboard* all of the unit work was involved, and in *Oliver* part of it. The bargaining in each case was *on behalf of* the unit employees. There was no holding that the unit bargaining representative could exercise mandatory authority to represent and negotiate *on behalf of* persons outside the bargaining unit.

The touchstone of these decisions is the protection of unit work and work standards.

There is nothing in *Oliver* that bears on the issue here. The principle applied in *Oliver* is the same as that in cases arising under the secondary boycott provisions [Sections 8(b)(4) and 8(e)] involving re-

strictions on the contracting out of unit work. Where contract clauses merely seek to remove the economic incentive for contracting out or even prohibit contracting out, these provisions have been upheld as legitimate attempts by the union to protect and preserve the unit work and work standards of the bargaining unit.[9]

Retirees have permanently left the work force, and pose no threat to the jobs or standards of the active unit employees. There can be no doubt that, given their ability to shut down operations by a strike and their consequent superior bargaining strength, the active unit employees can protect and advance their own bargaining interests, rates, and benefits, without having control over the negotiation of benefits of retirees. As petitioner acknowledges (p. 9):

> "To be sure, the union can negotiate a retirement plan for active employees alone and protect itself against breaches of that plan . . ." (Board Pet., p. 9)

This concession discloses the fallacy not only of the "interest" bargaining argument but, also, the subsidiary argument that the rates and benefits of active employees and retirees are so interwoven that it is unrealistic to contemplate bargaining about one and not the other. This company, and this is typical practice, has established various levels of benefits for persons retiring at different times. The levels and types of benefits, including medical benefits, differ substantially as between active employees and retirees. These vari-

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[9] *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967); *Orange Belt District Council of Painters No. 48, AFL-CIO* v. *NLRB*, 328 F.2d 534 (D.C.C.A., 1964).

ous benefit plans are clearly separate and distinguishable. There is no practical impediment to negotiating rates and retirement benefits for active employees without renegotiating the benefits of persons already retired. This is done in countless situations.

The basic infirmity of the "interest" bargaining theory is that it conflicts squarely with the language and purpose of the Act. As the court below held:

> "Congress decreed that the bargaining agent's authority extends only to bargaining for 'all the employees in a unit appropriate for such purposes'." (App. A, p. 18)

The concept of "interest" bargaining would substantially reshape the bargaining process as envisaged by the Act and as practiced over the years, and would create new areas of controversy and conflict, all the dimensions of which cannot be foreseen. There is no support in the Act for so radical a departure from the established rules.

C. There Is No Important Issue of Federal Law

The decision of the court below was made in harmony with well-established and well-understood principles that govern the bargaining process. The fact that this is the first case where the Board has attempted to extend mandatory bargaining to persons who are not employees and not in the bargaining unit underscores the degree of the Board's departure from these principles.

There is nothing that indicates that this issue has led to any significant labor-management conflict.

Assertions made that some employers voluntarily discuss or renegotiate retiree benefits may be assumed

to be true, although there is no evidence of this in the record of the case. It is equally true that many others do not. Briefs filed by *Amici* in the court below show that a wide variety of practices exist, ranging from unilateral improvements in retiree benefits by employers to negotiating improvements with the union, with a range of practices in between. What this practice shows most of all is that in an atmosphere of free collective bargaining, wholly free of restraint, labor and management have been able to find harmonious and satisfactory solutions to the problem on a voluntary basis.

The court below has done nothing to impinge on or hamper the development of these mutual arrangements. Rather, the court below has said that they are to be encouraged.

The court below has not, as petitioner implies, denied the protection of the Act to these voluntary arrangements. The court has held only that renegotiation of retiree benefits is not mandatory. These voluntary arrangements are still permissive and have not been in any degree inhibited by the decision.

There is perhaps no better way to inhibit management and labor from this type of experimentation and from further development of cooperative undertakings in new areas along voluntary lines than to hold that such voluntary efforts, *ipso facto,* create a mandatory obligation.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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